No. 93-1040

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

EMPRESA NACIONAL SIDERUGICA, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent,

and

COOPER/T. SMITH STEVEDORING COMPANY, INC.,

Respondent/Intervenor.

Petition For Writ Of Certiorari
To The Louisiana Court Of Appeal
For The Fourth Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

Pursuant to this Court's Rule 15.6, Petitioner Empresa Nacional Siderurgica, S.A. ("ENSIDESA"), hereby files its reply to Respondent Young and Respondent/Intervenor Cooper/T. Smith's oppositions to certiorari.

Several material misstatements of both law and fact taint the two briefs in opposition. We shall endeavor to deal, as summarily as possible, with the basic errors contained in those briefs, as well as with the specific matters therein which seem in most urgent need of correction.

First. Respondent Young quotes (Br. 11) Louisiana Code of Evidence Rule 606(B), but by the convenient use of an ellipsis (*id.*), veils a critical difference between Louisiana's Rule and Federal Rule of Evidence 606(b). Under Louisiana's restricted version, juror testimony impeaching the verdict is limited to

> "the question of whether any outside influence was improperly brought to bear upon any juror, and, *in criminal cases only,* whether extraneous prejudicial information was improperly brought to the jury's attention." Pet. App. 118a (emphasis added).

Thus in civil cases, Louisiana's Rule is substantially narrower than Federal Rule 606(b), under which

> "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

It follows that Young is quite wrong to say (Br. 21) that Louisiana's evidentiary rule is "virtually identical to Federal Rule of Evidence 606(b)"; the plain text of the two Rules shows otherwise.

Granderson's racism – his statement that "Jerry Young's case was like the case of the slaves when they were brought to this country from Africa, and that the steel beams were stowed the way slaves had been stored on ships," Affidavit of Gay Barbarin, Pet. App. 89a, if not "outside influence" under Louisiana Rule 606(B), is certainly "extraneous prejudicial information" under the broader Federal Rule 606(b). *Accord, Tobias v. Smith*, 468 F.Supp. 1287, 1290 (W.D.N.Y. 1979).

Cooper/Smith is likewise wrong to say that Louisiana's procedure for disallowing jurors' affidavits to impeach their own verdict "is substantially similar to the parallel federal rule and is consistent with all constitutional provisions." Cooper/Smith Br. 9. This compounds misunderstanding of the text of the two Rules with misstatement of the law, as we show next.

Second. Young and Cooper/Smith paint a legal portrait of seeming serenity surrounding Louisiana's version of Rule 606(B); there is lawyer's talk of consistent holdings (Young Br. 11, 16, 20) and of "settled precedent" (Young Br. 21), all of which, this Court is told, support the Fourth Circuit's absolutist reading, never mind due process of law, of Louisiana's Rule 606(B). Thus, Cooper/Smith boldly asserts (Br. 10):

> THE FOURTH CIRCUIT'S RULING THAT THE JURORS' AFFIDAVITS DID NOT DEMONSTRATE THE EFFECT OF OUTSIDE INFLUENCE IS EXACTLY WHAT COURTS HAVE HELD ON THE SAME ISSUE AND REFLECTS THE CONSTITUTIONAL BALANCE THAT HAS BEEN ESTABLISHED IN THIS WELL-SETTLED AREA.

This is a demonstrably false assertion of law.

As ENSIDESA has painstakingly documented in its petition, pp. 19-23, 28-30, every court, both federal and state, that has considered the question of whether racial prejudice constitutes "outside influence" or "extraneous prejudicial information" under Federal Rule of Evidence 606(b) or parallel state rules has left room for proof of egregious racial bias tainting the due process right to an impartial jury.

Such is *Smith v. Brewer,* 444 F.Supp. 482, 490 (S.D.Iowa 1978) ("the Court does not suggest that the rule of juror incompetency embodied in Rule 606(b) should be applied dogmatically and in complete disregard of what is alleged to have occurred in the jury room"; to ignore affidavits avouching racial bias in the jury room "might very well offend fundamental fairness"), *aff'd,* 577 F.2d 466 (8th Cir.), *cert denied,* 493 U.S. 967 (1978). So too, *Tobias v. Smith,* 468 F.Supp. 1287 (W.D.N.Y. 1979), and *Wright v. United States,* 559 F.Supp. 1139, 1151 (W.D.N.Y. 1983), *aff'd,* 732 F.2d 1048 (2d Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985) (noting that there are "potential constitutional difficulties in applying Rule 606(b) to all allegations of racial prejudice" and concluding that "the better rule . . . is to analyze each such claim on a case-by-case basis"), *aff'd,* 732 F.2d 1048 (2d Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985).

Neither Young nor Cooper/Smith mention any of these federal cases, as though they do not exist. To boldly declare that the law is well-settled against ENSIDESA's petition for certiorari, does not make it so.

Cooper/Smith (Br.11) quotes from *Shillcutt v. Gagnon,* 602 F.Supp. 1280, 1282 (E.D.Wisc. 1985), but fails to point out, as we do now, that the Seventh Circuit on appeal in

Shillcutt qualified the absolutist approach of the district court:

> "The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent."

Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987).

And what of Judge Elbert Tuttle's reasoning in *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (condemning racial bigotry in jury deliberations and ordering a new trial), which we quoted, aptly we thought, at the conclusion (p. 30) of our petition: "The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that . . . fundamental fair play require[s]." Again, the briefs in opposition – we submit, in betraying silence – say nothing of Judge Tuttle's eminently sound views.

As for state authorities, they, too, are set forth in detail in ENSIDESA's petition, pp. 15-18, 20-21, 28-29. It suffices here to point out that Young and Cooper/Smith again give a false impression of legal serenity by totally ignoring the unanimous opinion of the Wisconsin Supreme Court in *After Hour Welding v. Laneil Management*, 324 N.W.2d 686 (Wis. 1982), and the unanimous opinion of the California Supreme Court in *Weathers v. Kaiser Foundation Hospitals*, 485 P.2d 1132 (Cal. 1971), both of which, as we show in our petition, pp. 15-17, 28-29, squarely conflict on due process grounds with the holding of the Louisiana Fourth Circuit Court of Appeal below.

Thus respondent Young is on notably unsound ground in twice reciting (Br. 10, 20) that "the kinds of complaints made here against Juror Granderson's statements during deliberations have been consistently held inadmissible as competent evidence to impeach a jury verdict." As the case law cited in ENSIDESA's petition plainly shows, quite the contrary is true.

Third. Cooper/Smith quotes (Br. 12) Learned Hand's view in *Jorgensen v. York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir. 1947), but the clipped quotation reflects serious misunderstanding of Judge Hand's reasoning and a misleading half-truth.

First of all, Judge Hand says that the impossibility of achieving absolute justice "has induced judges to take a *middle course*," *id.* (our emphasis), between absolute enforcement of Lord Mansfield's rule prohibiting juror impeachment of a verdict, and the "necessary compromise," *id.*, of *McDonald v. Pless*, 238 U.S. 264 (1915), and of Cardozo, J., in *Clark v. United States*, 289 U.S. 1 (1933). In Judge Hand's words, omitted by Cooper/Smith:

> "All this has, however, nothing to do with what evidence shall be competent to prove the facts when the facts do require the verdict to be set aside, as concededly some facts do. The two decisions of the Supreme Court which we have cited, as well as the approach in United States v. Reid and Hyde v. United States, suggest it as not improbable that when the question arises in the future, the testimony of the jurors may be held competent, and that we shall no longer hear that they may not 'impeach their verdict,' when it is 'impeachable' if what they say is true."

160 F.2d at 435 (footnotes omitted). Judge Hand, in stark contrast to the trial court and the Fourth Circuit Court of Appeal below, concluded, "[W]e shall accept what the

affidavits said, as did the judge, and like him we shall decide whether it requires the relief asked." *Id.*

Properly understand, Learned Hand's view hardly supports the Fourth Circuit's blind-folded and absolutist construction of Louisiana Rule 606(B). To the contrary:

> "Courts have again and again ostensibly endorsed Mansfield's rule against the use of jurors' statements, but it appears that, almost without exception, where it has been said that a juror's affidavit or testimony is 'inadmissible,' the court has in fact considered what the juror has said but rejected it as insufficient. . . . We should not dispose of this case on a ground of admissibility; rather we should view it as Judge Hand did and consider what the affidavit says, and assuming the truth for these purposes then decide whether it should lead to a reversal."

Klimes v. United States, 263 F.2d 273, 274 (D.C. Cir. 1959) (per Burger, J.).

Fourth. Young says (Br. 12), "At the hearing on Ensidesa's motion for a new trial, the trial court considered the affidavits of the three jurors, but denied Ensidesa's motion." This is a complete half-turn from what Young's Brief to the Fourth Circuit Court of Appeal recites, *viz.*: "The trial court denied the defendants' motions without indicating whether or not the affidavits had been admitted." Young App., 87a. In point of actual fact, the trial court below, ignoring their content, held that the affidavits of Robert Jessup, Gay Barbarin, and Cynthia Gleason – all of which attest to Granderson's racism and hatred of foreign corporations – were inadmissible under the absolute strictures and narrow exception of Louisiana Rule 606(B). This was precisely Young's legal position before the trial court: "Plaintiffs objected to the admissibility of the affidavits to impeach the jury's

verdict." Young App. 87a. The Fourth Circuit's holding is the same. ENSIDESA Pet. pp. 7-8.

Fifth. Young (Br. 16) and Cooper/Smith (Br. 6-7) rely on *Tanner v. United States*, 483 U.S. 107 (1987), but in *Tanner*, and consistent with Learned Hand's view, Your Honors considered the affidavits submitted in support of new trial. This Court held, quite narrowly: "These allegations would not suffice to bring this case under the common law exception allowing post-verdict inquiry when an extremely strong showing of incompetency has been made." *Id.* at 126. ENSIDESA's uncontradicted affidavits swear to Granderson's insidious racial bias, affecting the jury's verdict, and denying petitioner due process of law:

> "Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal."

Edmonson v. Leesville Concrete Co., Inc., 498 U.S. 936, 111 S.Ct. 2077, 2088 (1991) (per Kennedy, J.). Accordingly, a result different from *Tanner* is required when post-trial affidavits swear to egregious racial bias tainting the right to an impartial jury.

Sixth. Respondent Young twice recites (Br. 12, 20) that no evidentiary hearing was requested upon ENSIDESA's motion for new trial. What ENSIDESA asked of the trial court, and in writing (Pet. App. 87a), was that "ENSIDESA urges this court to consider the matter fully," which is plainly an invitation to the trial court to hold an evidentiary hearing on the question of Granderson's racist statements and their probable prejudicial effects.

At any rate, ENSIDESA's motion for a new trial, supported by uncontradicted affidavits of Granderson's racial prejudice, is quite sufficient to impose upon the trial court, *sua sponte*, the affirmative duty of holding an evidentiary hearing "to ferret out the truth." *Morgan v. United States*, 399 F.2d 93, 97 (5th Cir. 1968). *Accord, After Hour Welding v. Laneil Management*, 324 N.W.2d 686, 691 (Wis. 1982), *viz.*:

> "The contents of the affidavit stand as a verity at this time and, if believed, as a matter of law, would have had the probable prejudicial effect upon a hypothetical jury when considering a question of credibility.
>
> "This case is being sent back to the trial court again with instructions to conduct a hearing taking testimony as the judge believes necessary from persons who may have knowledge of the alleged incidents. Due to the thus far uncontroverted affidavit of the dissenting juror, the trial court should examine the juror under oath only as the circumstances under which the statements were made and not as to what effect they had, if made, on himself as a juror or on the other jurors. The judge must then determine whether he is convinced by clear and satisfactory evidence the statements were made and determine as a matter of law the probable effect of them upon a hypothetical average jury."

Your Honors have laid down the same due process procedure: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). And more: "A juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called

upon to decide." *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983).

Seventh. Sweeping aside this Court's rulings and those of the lower federal courts, ignoring the holdings of two state supreme courts and of several intermediate state appellate courts, respondent Young now says (Br. 20)

> "Moreover, the affidavits presented, even if considered, fall far short of establishing by clear and convincing evidence that Mr. Granderson was racially biased or that racial bias prejudice that jury's verdict against Ensidesa."

To this, we need only reply that Mr. Granderson was ousted as jury Foreman, one hour after deliberations began, because of his racist statements and his railing against wealthy foreign corporations. Affidavit of Robert N. Jessup, Jr., Pet. App. 81a-82a. The offended venire's action speaks clearly and convincingly of Granderson's racism. The uncontroverted facts show that Granderson's racial hatred and his invidious screaming against foreign corporations continued unabated for an additional ten hours. Affidavit of Cynthia Gleason, Pet. App. 92a. 93a. The jury's special verdict on damages included punitive elements outside the pleadings and impermissible in this maritime action, as well as far in excess of plaintiff's own evidence – "perhaps the most compelling proof that the deliberations were not governed by a careful consideration of the evidence, but were instead the product of sympathy, prejudice, and passion." Memorandum in Support of Alternative Motion of ENSIDESA for a New Trial, Pet. App. 73a.

Due process of law requires Your Honors to judge the affidavits themselves, without blinders. The Louisiana

Court of Appeal's interpretation of Article 606(B) as absolutely barring judicial consideration of ENSIDESA's affidavits, in spite of the invidious bias shown, raises a substantial constitutional question which imperatively calls for review by this Court. *Cf. Liteky v. United States*, No. 92-6921, argued here November 3, 1993.

CONCLUSION

For the foregoing additional reasons, this Court should grant certiorari.

Respectfully submitted,

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